IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

:: **J U D G M E N T** ::

S.B. CIVIL FIRST APPEAL NO.50/1988
The Cotton Corporation of India & Anr.
Vs.
M/s. Balkishan Om Prakash

S.B. CIVIL FIRST APPEAL AGAINST THE JUDGMENT AND DECREE DATED 18.01.1988 PASSED BY THE LEARNED ADDITIONAL DISTRICT JUDGE NO.2, SRI GANGANAGAR IN CIVIL ORIGINAL SUIT NO.57/85 (68/79) – M/S. BALKISHAN OM PRAKASH VS. THE COTTON CORPORATION OF INDIA LTD. & ANOTHER

DATE OF JUDGMENT : 24th April, 2007

P R E S E N T

HON'BLE MR. JUSTICE DEO NARAYAN THANVI

Mr. Vijay Aggarwal for the appellants.
Mr. Pawan Ojha for
Mr. S.G.Ojha for the respondent.

BY THE COURT :

This appeal has been filed by the defendants-appellants-the Cotton Corporation of India Ltd., Bombay and its Branch

Office at Sri Ganganagar against the judgment and decree dated 18.1.1988 passed by the learned Additional District Judge No.2, Sri Ganganagar in Civil Original Suit No.57/85 (68/79) – M/s. Balkishan Om Prakash Vs. the Cotton Corporation of India Ltd. The plaintiff-respondent has also filed cross-objections with regard to the payment of interest on the decreetal amount.

The dispute as per the averments made in the plaint was with regard to the non-delivery of three wagons and 7 Qtls. 72 kgs. 700 gms. of cotton seeds, out of the total delivery of 14 wagons of 125 Qtls. each by the defendants-appellants in the month of December 1978. On failure in the delivery of the said wagons of cotton seeds by the defendants-appellants, the plaintiff-respondent served a notice Ex.A/14 dated 9.1.79, in which, he has stated that the contract may be treated as cancelled as the defendants-appellants have failed to deliver the goods within the stipulated time of ten days, to which they will also be responsible for loss incurred therein as the contract was not of forward in nature. According to the respondent-plaintiff, he served a notice Ex.1 dated 12.7.79, wherein, it was stated that even if the defendants-appellants deliver the goods within seven days, respondent-plaintiff shall be ready to take the delivery else he will purchase the goods from the market for which the defendants-appellants will be held responsible for the

damages. After purchase of the goods, a telegram Ex.5 dated 21.7.79 was also sent. Defendants-appellants in their written statement admitted transaction but pleaded that remaining part of delivery was not taken by the plaintiff-respondent despite several letters and claimed compensatory costs of Rs.2000/-. Upon pleadings of the parties, the learned trial judge framed the following issues:

> "(1)क्या फर्म वादी प्रतिवादीगण से मुताबिक मुहायदा तीन गाड़ी व 7 क्विं0 72 किलो 700 ग्राम बिनौला न देने के कारण 17,171 रू0 41 पैसे बतौर हर्जाना पाने की हकदार है ?
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> (2)क्या दिनांक 11.6.79 को फर्म वादी के मैंनेजर ओमप्रकाश ने मुताबिक पैरा नं0 13 जवाब दावा मुहायदा किया, यदि हाँ तो उसका वाद पर क्या प्रभाव है ?
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> (3)क्या प्रतिवादीगण हर्जाना विशेष के रूप में 2,000/- रू0 पाने के हकदार है ?
>
> (4)अनुतोष क्या होगा ?"

The learned trial court decided issues Nos.1 to 3 in favour of the plaintiff-respondent and decreed the suit for damages of Rs.17,171.41paisa. The contention of the learned counsel for the defendants-appellants is that the rate of cotton seeds should be counted from the date of breach of contract Ex.A/14 dated 9.1.79. When the notice was given by the plaintiff-respondent. On this date, the market rate of the cotton seeds was Rs.150/- per quintal, on which, no finding has been given by the learned

trial court. In support of his contention, he has placed reliance on the decisions of the Hon'ble Supreme Court in Union of India Vs. M/s. Jolly Steel Industries (P) Ltd. & Others, reported in AIR 1980 Supreme Court 1346 and M.N. Gangappa (dead) by his legal representatives Vs. A.N.Setty & Co. and Another, reported in AIR 1972 Supreme Court 696.

On the other hand, learned counsel for the plaintiff-respondent has stated that there was no written contract between the parties but an oral agreement was there to deliver the goods within ten days but when the defendants-appellants have failed to deliver the goods within the stipulated time then the plaintiff-respondent had made arrangements for the receipt of goods from the other firms i.e. Surajmal Nagarmal & Company and Sri Gurunanak Trading Company, Sri Ganganagar vide Ex.2 dated 20.7.79 & Ex.6 dated 4.8.79 respectively, in which, the rate charged for the goods was much higher than the rate agreed upon by the defendants-appellants as shown in notice EX.A/14. According to the learned counsel, the learned trial court has also not awarded the interest on the decreetal amount, therefore, the plaintiff-respondent has also filed cross objections.

I have gone through both the rulings. In the case of Union

of India Vs. M/s Jolly Steel Industries (P) Ltd & Others (supra), there was an agreement between both the parties and the Hon'ble Apex Court while taking into consideration the facts of the protracted litigation advised the parties to adopt a middle course and it was observed that the price of the damages will be fixed on which the delivery ought to have been made, which will be determined by the executing court after leading the evidence. The same principle was laid down in M.N.Gangappa's case (supra) while dealing with the scope of Section 73 of the Contract Act. Here in the present case, there is no written contract between the parties and it is the admitted position that the delivery of the goods was not made within the stipulated time of ten days as shown in Ex.A/14 and the prevailing rate of the cotton seeds at that time was Rs.150 per quintal.

I have also gone through the evidence of both the parties. It has been admitted by witness of defendants-appellants Shri Harish Chandra DW-1, Cotton Purchaser of the defendant-Corporation in his cross-examination that due to non-availability of the goods, the cotton seeds were not sent.

Now the question to be seen is that when the defendants -appellants were not having the goods to supply and the plaintiff-respondent was in short of the goods then from which

date the price of the damages should be counted. In the normal course, when there is a written agreement between the parties with regard to the rate of damages and about difference in price of goods than it should be from the date of its breach as has been held by the Hon'ble Apex Court in its decisions referred above but in the absence of any contract to the contrary the damages ought to have been counted from the date when the plaintiff-respondent makes good of his loss and this is the simple spirit of Section 73 of the Contract Act, else it may be a case of compensation for breach of contract where penalty is stipulated by virtue of Section 74 of the Contract Act.

In the present case, it is apparent from the bills of July & August, 1979 Ex.2 & 6 respectively where balance cotton seeds were purchased by the plaintiff-respondent at the rate of Rs.195/- per quintal. It is also clear from the books of accounts which have been kept regularly in the ordinary course of business and the proof of the plaintiff-respondent by Ex.4 that total loss was of Rs.17,171.41paisa due to difference of rate. In my view, in the absence of rebuttal with regard to the date of breach of contract, price of goods, the averments made by the plaintiff-respondent in his plaint and proof, there seems no illegality in the finding arrived at by the learned trial court, which requires any interference in this appeal. As regards cross

objections about the interest, there was also no agreement that on breach of contract, plaintiff-respondent shall be entitled to get interest.

In view of the aforesaid, there is no merit in this appeal and also in the cross objections. Accordingly, the impugned judgment & decree of the learned trial court are maintained and the appeal as well as the cross objections stands dismissed with no order as to costs.

(DEO NARAYAN THANVI), J.

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